



One South Montana Avenue, Suite M1 · Helena, MT 59601
Phone: 406-443-4032 · Fax: 406-443-4220 · Toll Free: 800-477-1864
Email: mtmar@montanarealtors.org · Web: www.montanarealtors.org

Bill Memo

Senate Bill 231 – Revise the impact fee act to require service area report

Sponsor: Sen. Rick Laible

Hearing:

Senate Local Government Committee

Feb. 18, 2009, Room 405

Purpose

Impact fees are designed to make development pay for itself. These fees are not to be a punitive tax on economic growth or a means to remedy existing deficiencies. Accordingly, SB 185 (2005) was drafted in order to ensure that impact fees were proportionate and related to the burden imposed by new development. SB 185 (2005) accomplished that goal by setting forth specific financial and analytic requirements to be met by governmental entities.

Unfortunately, cities and counties have not fully complied with §7-6-1601 et seq., MCA. Thus the primary purpose of this proposal is to refine and clarify the documentation requirements under §7-6-1602, MCA, in order to make certain that governmental entities take the proper steps to guarantee that development pays for itself and is not assessed impact fees in excess of its impacts.

In short, this proposal is designed to clarify the analysis and documentation that is required of governmental entities prior to assessing impact fees. This proposal in no way alters the substance of §7-6-1601 et seq., MCA because it is the view of the Montana Association of REALTORS® that the current law is well-drafted, even-handed, and comprehensive. Rather, the impetus for the amendments is the way governmental entities have applied the law.

As suggested above, the flaw in application relates specifically to §7-6-1602, MCA. Rather than show, affirmatively, that these requirements have been met in an impact fee report or in some other comprehensive analysis, governmental entities have chosen instead to present their impact fee assessments and then refer to other documentation that is allegedly responsive to §7-6-1602, MCA. This secondary documentation may or may not be available online; it may or may not be current; it may or may not be raw data; and it may be so poorly presented and organized that the meaning of the data or documentation may be unclear, even to a sophisticated reviewer.

Ultimately, the secondary documentation may not comply with §7-6-1602, MCA, but this conclusion is possible only after a diligent seeking of the supporting documents and tedious review. In many instances, the impact fees that are based on potentially deficient or erroneous data analysis would already be enacted. This lack of transparency means that there is no straightforward or consistent way to verify that governmental entities are assessing lawful impact fees.

By amending current law to require a service area report ("SAR"), governmental entities will have no option but to provide the requisite data and analysis in one report, instead of referring to myriad documents, the contents of which cannot be confirmed without significant expenditure of time and resources by the public and direct affected interests.

Additionally, since the SAR must be an organized, comprehensive assessment of the items listed under §7-6-1602, MCA, it may serve as a tool to adjust future impact fee rates. This should be a significant savings to government entities.

Analysis by Section

Section 1. Section 7-6-1602, MCA, is amended to read:

"7-6-1602. Calculation of impact fees -- documentation required -- ordinance or resolution -- requirements for impact fees. (1) For each public facility for which an impact fee is imposed, the governmental entity shall prepare and approve a service area report.

(2) The service area report is a written analysis that must document that:

- (a) ~~describes~~ describe existing conditions of the facility;
- (b) ~~establishes level-of-service~~ establish level-of-service standards;
- (c) ~~forecasts~~ forecast future additional needs for service for a defined period of time;
- (d) ~~identifies~~ identify capital improvements necessary to meet future needs for service;
- (e) ~~identifies~~ identify those capital improvements needed for continued operation and maintenance of the facility;
- (f) ~~makes~~ make a determination as to whether one service area or more than one service area is necessary to establish a correlation between impact fees and benefits;
- (g) ~~makes~~ make a determination as to whether one service area or more than one service area for transportation facilities is needed to establish a correlation between impact fees and benefits;
- (h) ~~establishes~~ establish the methodology and time period over which the governmental entity will assign the proportionate share of capital costs for expansion of the facility to provide service to new development within each service area;
- (i) ~~establishes~~ establish the methodology that the governmental entity will use to exclude operations and maintenance costs and correction of existing deficiencies from the impact fee;
- (j) ~~establishes~~ establish the amount of the impact fee that will be imposed for each unit of increased service demand; and
- (k) ~~has~~ have a component of the budget of the governmental entity that:
 - (i) schedules construction of public facility capital improvements to serve projected growth;
 - (ii) projects costs of the capital improvements;
 - (iii) allocates collected impact fees for construction of the capital improvements; and
 - (iv) covers at least a 5-year period and is reviewed and updated at least every 2 years.

(3) The service area report is a written analysis that must contain documentation of sources and methodology used for purposes of subsection (2) and must document how each impact fee meets the requirements of subsection (7).

~~(2)(4)~~ The data sources and methodology service area report supporting that supports adoption and calculation of an impact fee must be available to the public upon request.

~~(3)(5)~~ The amount of each impact fee imposed must be based upon the actual cost of public facility expansion or improvements or reasonable estimates of the cost to be incurred by the governmental entity as a result of new development. The calculation of each impact fee must be in accordance with generally accepted accounting principles.

~~(4)~~(6) The ordinance or resolution adopting the impact fee must include a time schedule for periodically updating the documentation required under subsection ~~(4)~~ (2).

~~(5)~~(7) An impact fee must meet the following requirements:

(a) The amount of the impact fee must be reasonably related to and reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the new development.

(b) The impact fees imposed may not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity in accommodating the development. The following factors must be considered in determining a proportionate share of public facilities capital improvements costs:

(i) the need for public facilities capital improvements required to serve new development; and

(ii) consideration of payments for system improvements reasonably anticipated to be made by or as a result of the development in the form of user fees, debt service payments, taxes, and other available sources of funding the system improvements.

(c) Costs for correction of existing deficiencies in a public facility may not be included in the impact fee.

(d) New development may not be held to a higher level of service than existing users unless there is a mechanism in place for the existing users to make improvements to the existing system to match the higher level of service.

(e) Impact fees may not include expenses for operations and maintenance of the facility."

Rationale: As suggested above, these changes are limited. Under §7-6-1602(1), MCA, the requirement of a service area report ("SAR") is added. The service area report is a new requirement in name only; the required contents of the SAR are already set forth in the current law and are not altered. The objective of this amendment is to clarify how governmental entities must demonstrate compliance with §7-6-1602, MCA. Namely, they must create a written analysis based on growth data, etc., which is directly responsive to 7-6-1601 et seq., MCA.

As stated above, this amendment links the SAR to the requirements under §7-6-1602(1) so that all the requirements which governmental entities previously failed to make accessible or comprehensible must now be set forth in the service area report, expressly required for that purpose. Furthermore, because the service area report analysis and documentation must occur at the service area level, this amendment guarantees that governmental entities will be in compliance with §7-6-1602(1)(f) and 1602(1)(g), MCA, that require determination of whether one or more service areas is necessary. At present, governmental entities assess fees on only one service area respectively and also fail to set forth their rationales for doing so.

Section 2. 7-6-1603, MCA, is amended with the following clarification:

"7-6-1603. Collection and expenditure of impact fees -- refunds or credits -- mechanism for appeal required. (1) The collection and expenditure of impact fees must comply with this part. The collection and expenditure of impact fees must be reasonably related to the benefits accruing to the development paying the impact fees. The ordinance or resolution adopted by the governmental entity must include the following requirements:

(a) Upon collection, impact fees must be deposited in a special proprietary fund, which must be invested with all interest accruing to the fund.

(b) A governmental entity may impose impact fees on behalf of local districts.

(c) If the impact fees are not collected or spent in accordance with the impact fee ordinance or resolution or in accordance with 7-6-1602, any impact fees that were collected must be refunded to the person who owned the property at the time that the refund was due.

(2) All impact fees imposed pursuant to the authority granted in this part must be paid no earlier than the date of issuance of a building permit if a building permit is required for the development or no earlier than the time of wastewater or water service connection or well or septic permitting.

(3) A governmental entity may recoup costs of excess capacity in existing capital facilities, when the excess capacity has been provided in anticipation of the needs of new development, by requiring impact fees for that portion of the facilities constructed for future users. The need to recoup costs for excess capacity must have been documented pursuant to 7-6-1602 in a manner that demonstrates the need for the excess capacity. This part does not prevent a governmental entity from continuing to assess an impact fee that recoups costs for excess capacity in an existing facility. The impact fees imposed to recoup the costs to provide the excess capacity must be based on the governmental entity's actual cost of acquiring, constructing, or upgrading the facility and must be no more than a proportionate share of the costs to provide the excess capacity.

(4) Governmental entities may accept the dedication of land or the construction of public facilities in lieu of payment of impact fees if:

(a) the need for the dedication or construction is clearly documented pursuant to 7-6-1602;

(b) the land proposed for dedication for the public facilities to be constructed is determined to be appropriate for the proposed use by the governmental entity;

(c) formulas or procedures for determining the worth of proposed dedications or constructions are established as part of the impact fee ordinance or resolution; and

(d) a means to establish credits against future impact fee revenue has been created as part of the adopting ordinance or resolution if the dedication of land or construction of public facilities is of worth in excess of the impact fee due from an individual development.

(5) Impact fees may not be imposed for remodeling, rehabilitation, or other improvements to an existing structure or for rebuilding a damaged structure unless there is an increase in units that increase service demand as described in 7-6-1602(1)(j) 7-6-1602(2)(j). If impact fees are imposed for remodeling, rehabilitation, or other improvements to an existing structure or use, only the net increase between the old and new demand may be imposed.

(6) This part does not prevent a governmental entity from granting refunds or credits:

(a) that it considers appropriate and that are consistent with the provisions of 7-6-1602 and this chapter; or

(b) in accordance with a voluntary agreement, consistent with the provisions of 7-6-1602 and this chapter, between the governmental entity and the individual or entity being assessed the impact fees.

(7) An impact fee represents a fee for service payable by all users creating additional demand on the facility.

(8) An impact fee ordinance or resolution must include a mechanism whereby a person charged an impact fee may appeal the charge if the person believes an error has been made."

Rationale: This amendment is a correction for internal consistency.